

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

FLAT DOG PRODUCTIONS, INC.;  
FRANK T. DEMARTINI, P.C.;  
FRANK T. DEMARTINI, INDIVIDUALLY;  
DRAGON PRODUCTIONS A.V.V.

and

Case 31-CA-24062

INTERNATIONAL ALLIANCE OF  
THEATRICAL STAGE EMPLOYEE AND  
MOVING PICTURE TECHNICIANS, ARTISTS  
AND ALLIED CRAFTS OF THE UNITED  
STATES AND CANADA, AFL-CIO

**Brian Gee, Atty.**, Counsel for the General Counsel,  
Region 31, Los Angeles, California.

**Barbara Fitzgerald and Vincent Floyd, Attys.**, Counsel for  
Respondent, Flat Dog Productions, Inc., Seyfarth Shaw,  
Los Angeles, California.

**Donald A. Barton, Atty.**, Counsel for Respondent,  
Frank T. DeMartini, P.C., Los Angeles, California.

**Frank t. DeMartini, Atty.**, pro per, Los Angeles, California.

**SUPPLEMENTAL DECISION**

**Statement of the Case**

LANA H. PARKE, Administrative Law Judge: On August 31, 2000, the Board issued its Decision and Order in *Flat Dog Productions, Inc.*, 331 NLRB 1571 (the Board's Order) directing, inter alia, a remedial order against Flat Dog Productions, Inc. (Respondent Flat Dog)<sup>1</sup> to make whole all discriminatees who engaged in an economic strike on and around August 17, 1999, with interest, for any loss of earnings and benefits suffered as a result of the discrimination against them. On June 11, 2002, the United States Court of Appeals for the District of Columbia entered its Judgment enforcing the Board's Order in its entirety.<sup>2</sup>

Respondent Flat Dog having failed and refused to pay backpay to the discriminatees in accordance with the Board's Order, and a controversy having arisen over the amount of backpay due under the terms of the Board's Order, on May 22, 2003, the Regional Director of Region 31 issued an amended Compliance Specification and Notice of Hearing and thereafter a Second Amended Compliance Specification (Compliance Specification). The Compliance

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<sup>1</sup> At the supplemental hearing, counsel for Respondent Flat Dog stated the company's accurate name is Flat Dog Corporation.

<sup>2</sup> *N.L.R.B. v. Flat Dog Productions*, 34 Fed. Appx. 548, (9th Cir. Apr 18, 2002, not selected for publication in the Federal Reporter, NO. 01-70346)

Specification added Frank T. DeMartini, P.C, (Respondent P.C.), Frank T. DeMartini, individually (Respondent DeMartini or Mr. DeMartini), and Dragon Productions A.V.V. (Dragon) as respondents. The Compliance Specification further alleged that Respondent Flat Dog and Respondent P.C. are affiliated business enterprises and constitute single employers and alter ego corporations. The Compliance Specification further alleges that Respondent DeMartini, Respondent Flat Dog, and Respondent P.C. (collectively Respondents) share such a unity of interests as to obviate adherence to corporate forms and that Respondent DeMartini is personally liable for the remedial obligations of Respondents Flat Dog and P.C. At the hearing, Counsel for the General Counsel withdrew all allegations relating to Dragon (Compliance Specification paragraph 5)<sup>3</sup> and made certain changes in the appendices to the Compliance Specification.<sup>4</sup>

In their answers, Respondents deny that Respondent Flat Dog and Respondent P.C. are affiliated business enterprises, constitute a single employer under the National Labor Relations Act (the Act), constitute alter ego corporations under the Act, collectively satisfy the Board's jurisdictional standards, and are employers within the meaning of the Act. Respondents also deny that Respondents held such a unity of interest and so lacked respect for the separate corporate identities as to obviate adherence to the corporate forms of Respondents Flat Dog and P.C. Respondents further deny the Respondent DeMartini is personally liable for the remedial obligations of Respondents Flat Dog and P.C. Respondents affirmatively defend on grounds that the Board lacks subject matter and personal jurisdiction over Respondent P.C. and Respondent DeMartini, that the statute of limitations bars litigation against Respondent P.C. and Respondent DeMartini, that the doctrine of unclean hands applies, that Respondents have not been afforded due process, that certain alleged discriminatees were not expected to work on or after August 17, 1999<sup>5</sup> and therefore are not entitled to backpay, and that discriminatees failed to mitigate damages.<sup>6</sup>

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<sup>3</sup> Counsel for the General Counsel represented that the withdrawal of allegations was based on the Region's inability to effect service of process on Dragon, a Dutch Antilles' corporation.

<sup>4</sup> Counsel for the General Counsel presented updated revisions to the backpay calculations of the Compliance Specification at the hearing.

<sup>5</sup> All dates herein are in 1999 unless otherwise specified.

<sup>6</sup> I granted Counsel for the General Counsel's motion to strike Respondents' answers insofar as they denied or attempted to bring into issue the unlawfulness of the striker discharges in *Flat Dog*, *Ibid.* I have addressed herein only those of Respondents' arguments for which evidence was presented.

Hearing was held in Los Angeles, California on September 22 and 23, 2003, at which all parties appeared.<sup>7</sup> On the entire record and after considering the briefs filed by all parties,<sup>8</sup> I make the following

## Findings and Conclusions

### I. The Board's Order

The Board in its unfair labor practice decision herein ordered, in pertinent part, as follows:

Respondent, Flat Dog Productions, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall...

2. Take the following affirmative action necessary to effectuate the policies of the Act.

....

(a) Make whole its employees who engaged in an economic strike on August 17, 1999, for any and all losses incurred as a result of Respondent's unlawful discharge of them, with interest...<sup>9</sup>

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

### II. The Issues

#### A. Liability

##### 1. The Charged Entities

At all relevant times, Respondent DeMartini practiced law within the corporate structure of Respondent P.C., which entity was located at 3765 Motor Avenue, Room 710, Los Angeles, California (the Motor Avenue address). At all relevant times, Respondent DeMartini has been Respondent P.C.'s chief executive officer, corporate secretary, chief financial officer, sole

<sup>7</sup> At the hearing, Respondents P.C. and DeMartini moved to dismiss allegations of the Compliance Specification as to them on grounds that neither had been parties in the underlying unfair labor practice adjudication, citing *Northern Montana Healthcare Center*, 178 Fed.3d 1089 (9<sup>th</sup> Cir. 1999). Inasmuch as all Respondents herein have been served with the Compliance Specification, have appeared at the hearing, and have been given the opportunity to litigate alter ego and/or single employer status and liability for the underlying unfair labor practices, I deny the motion. *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960); *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292, 296 (2d Cir. 1996) ("[A] party may be found to be an alter ego without relitigating the underlying unfair labor practices...")

<sup>8</sup> Respondents P.C. and DeMartini join in the arguments advanced in Respondent Flat Dog's brief.

<sup>9</sup> The Board affirmed the Administrative Law Judge's conclusion the "the discharged strikers are entitled to backpay from the date of the employer's unlawful action until the date he or she would have lawfully been laid off. Reinstatement is not an issue in this case as production of the movie has been completed." *Flat Dog*, supra at 1573. The Board left identification of the strikers to the compliance stage of the proceedings.

director, sole shareholder, and only employee. Sometime in 1999, Respondent P.C. entered into a development agreement for production of a low-budget film about crocodiles attacking college students (the Film).<sup>10</sup>

Respondent P.C. incorporated Respondent Flat Dog for the sole purpose of producing the Film. The corporate address of Respondent Flat Dog was the Motor Avenue address.<sup>11</sup> At all relevant times, Respondent DeMartini served as Respondent Flat Dog's chief executive officer, secretary, chief financial officer, sole director, and designated agent. The sole shareholder of Respondent Flat Dog has been Respondent P.C. Respondent Flat Dog was originally capitalized by Respondent P.C., which secured financing from film distributor and financial lender, Dragon, by loan agreement dated July 19 (the Loan Agreement).<sup>12</sup> Attorney Jason Frankel of the law firm of Barab, Kline & Coate represented Respondent Flat Dog; that law firm also represented Dragon. As to default/disability, the Loan Agreement provided, in pertinent part as follows:

8. **DEFAULT/DISABILITY.** Upon any material breach by [Respondent Flat Dog] of any of the terms and conditions hereof or upon the occurrence of any Event of Default hereunder, [Dragon] shall have the right to terminate this agreement and require [Respondent Flat Dog] to immediately repay the Loan. If [Respondent Flat Dog] fails to repay the Loan within forty-eight (48) hours of demand by [Dragon], [Dragon] has the unfettered right to require [Respondent Flat Dog] to transfer to [Dragon]...any and all rights in and to the Screenplay and Picture...and any other rights that [Respondent Flat Dog] may have...In the event of such transfer of rights, [Dragon], at its option, may require [Respondent Flat Dog] to complete the Picture as specified herein. Event of Default shall mean any of the following:

....  
8.2 Any time when [Respondent Flat Dog] is more than two (2) days behind the approved shooting schedule.

....  
8.4 The cessation by [Respondent Flat Dog] of principal photography prior to its completion. Completion of principal photography shall mean photography of all scenes in the approved final shooting script.

## 2. The Production

Filming commenced in early August. Filming progress as charted by daily production records varied from day to day. The production records show that prior to August 17, setups ranged from 11–25 per day, while film footage ranged from 1570-8260 feet per day.

<sup>10</sup> The Film, originally named "Flat Dog" was eventually released under the title "Crocodile" and as of the hearing date had grossed over \$4.2 million.

<sup>11</sup> Although Mr. DeMartini testified that Respondent Flat Dog had offices separate from Respondent P.C.'s Motor Avenue address, he was vague as to details and time. I note that letters from Dragon to Respondent Flat Dog were addressed to the Motor Avenue address. I conclude the Motor Avenue address was a communal address for both corporations and, contrary to Mr. DeMartini's testimony, that books and records for both corporations were maintained at the Motor Avenue location.

<sup>12</sup> Respondent P.C. currently holds a promissory note from Respondent Flat Dog, having loaned Respondent Flat Dog a sum under \$10,000 in the last year.

As found in the underlying decision, on Tuesday, August 17 certain of Respondent Flat Dog's employees declined to cross a picket line established by international Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO, CLC (the Union), and Respondent Flat Dog terminated them.<sup>13</sup>

By letter dated August 19 and addressed to "All employees and Former Employees," Mr. DeMartini wrote, in pertinent part, as follows:

....

...all of the former employees of this corporation signed a written employment agreement laying out their obligations to the corporation. An unannounced wildcat strike without formal union representation clearly breaches that written employment agreement and is clear legal justification for discharge.

....

...This movie is being funded by a single person from the middle east that some of you know and consider to be a friend....<sup>14</sup>

...the economics of low budget film making make it impossible to produce a low budget movie in California if we are forced to pay union rates and pension, health, and welfare for movies under two million dollars...The logical result of this is that movie producers have fled in droves to Canada, Australia [etc.]...Against the trend however, we decided to make our movies in California, not in Canada, and to provide employment for local crews rather than Canadian crews. The IATSE's response to this is to organize a wildcat strike, something we find impossible to understand.

...we will not cave in to the gangster tactics being employed by IATSE. We have a full crew of honest and upstanding people who want to work on this film at the present time...

Early in the production of the Film, production fell behind one day. As of August 16, Respondent Flat Dog was close to catching up on production (Although a one-day delay was still noted on the production records). On and after the strike commenced, the daily production records show the following information:

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<sup>13</sup> Production notes state, "Upon arrival to set, production was confronted by I.A.T.S.E. organizers & picketers causing most of the crew...not to report to work. Producer Frank DeMartini had no choice but to fire those individuals for breaching their contracts."

<sup>14</sup> The individual Mr. DeMartini referred to was Edward Chamician (Mr. Chamician), later listed as an executive producer of the Film and present on the Mexico set at least two of the three production weeks. Mr. DeMartini admitted at the hearing that he did not know to what extent, if any, Mr. Chamician was involved in the Film's funding.

	<u>Date</u>	<u>Number of setups</u> <sup>15</sup>	<u>Number of film feet shot</u>
	August 17	10	N/A
	August 18	4	2720 <sup>16</sup>
5	August 19	11	2400 <sup>17</sup>
	August 20	0	0 <sup>18</sup>

On August 20, after failing to reach agreement with the Union, Respondent Flat Dog closed the production in California. Mr. DeMartini, who had had almost hourly conversations about the situation with Dragon's counsel, who was also counsel for Respondent Flat Dog, notified him the production was shut down on August 20. On the same day, Dragon served notice on Respondent Flat Dog that it was in default of the Loan Agreement. A letter from Dragon's attorney (Demand Letter) dated August 20 was hand-delivered to Respondent Flat Dog and reads, in pertinent part:

Acting on behalf of our client, [Dragon], you are hereby notified that [Respondent Flat Dog] is in default under paragraph 8.4 of [the Loan Agreement]...in that [Respondent Flat Dog] has ceased principal photography of the Picture before completion.

Pursuant to paragraph 8 of the Agreement, [Dragon] is terminating the Agreement and hereby demands that [Respondent Flat Dog] repay the loan...within forty-eight (48) hours. [Respondent Flat Dog's] failure to repay the Loan may result in its loss of all rights in and to the Picture.

According to Mr. DeMartini, he was sure he had discussions with representatives of Dragon about the Demand Letter and as there was "no way we could complete the picture because of Union activity, we decided to turn the picture over to Dragon." Mr. DeMartini met with himself as the Flat Dog board of directors, discussed the matter with himself, and issued a "Consent."<sup>19</sup> In exchange for a settlement of the production loan, Respondent Flat Dog ceded all rights in the Film to Dragon by signing a document entitled "Assignment of All Rights," on August 24.<sup>20</sup>

Principal photography resumed on September 6 in Mexico, and the Film was admittedly finished there so that IATSE could not follow the production. Although neither Respondent P.C. nor Respondent Flat Dog had any obligation to complete the Film after having turned over all rights to Dragon, Respondent Flat Dog provided production services for the Film, paying bills

<sup>15</sup> Every time the camera is moved counts as a setup.

<sup>16</sup> A production note reads, "Even with skeleton replacement crew, company managed to move along with the days' [sic] work."

<sup>17</sup> A production note reads, "\*Note: revised total shooting days...Est. finish date is Tuesday August 31, 1999." Prior scheduled finish date had been August 28.

<sup>18</sup> A production note for August 20 reads, "@ 1:45 pm company officially shut down indefinitely by I.A.T.S.E.'s pressure & threatening actions to director of photography, assoc. producer, & other crew members. Company was forced to leave the country. Nothing was shot today."

<sup>19</sup> Respondent did not produce any document to reflect the "consent."

<sup>20</sup> The only reference to any of Respondent Flat Dog's actions in the minutes of its annual corporate meeting held the following June 2000, at which only Mr. DeMartini was present, was a statement that all of the preceding year's acts were ratified and accepted by the Corporation.

and otherwise overseeing production under, according to Mr. DeMartini, an oral agreement with Dragon. Some testimonial inconsistency exists in this regard. Mr. DeMartini testified that neither Respondent P.C. nor Respondent Flat Dog had any legal responsibility to complete the film but that he was so obligated pursuant to (unexplicated) instructions by counsel for Dragon.

Mr. DeMartini continued as producer of the Film in Mexico in his individual capacity and also as an officer of Respondent Flat Dog, which served as a contractor to Dragon upon the Film's removal to Mexico. Again, some inconsistency exists in the testimony concerning which entity contracted for and which entity provided production services. Mr. DeMartini testified, "Pursuant to the agreement where the P.C. provided services for Flat Dog to produce the movie, under a loan out for me, it paid the salary to...me...in the amount of I think it was \$35,000."

Mr. DeMartini explained that he had an exclusive employment agreement with Respondent P.C., that in order for Respondent Flat Dog to obtain his individual services to produce the Film, Respondent Flat Dog had to contract with Respondent P.C. for his services. Mr. DeMartini, as the only officer of Respondent Flat Dog approved the contract offer. Mr. DeMartini, as the officer of Respondent P.C. approved the loan-out. Mr. DeMartini, as Respondent DeMartini, agreed to perform the services. Mr. DeMartini performed the same services in Mexico as he had in Los Angeles. Respondents presented no documentation of any of these agreements.

Because of inconsistencies in Mr. DeMartini's testimony as set forth herein and his resistant manner in testifying, I decline to give weight to any of his testimony unsupported by other indicia of trustworthiness. Accordingly, I conclude that Mr. DeMartini, as an individual and/or as the officer of Respondent Flat Dog, oversaw the entire film production in Mexico including the wrap.<sup>21</sup> Thereafter, Respondent Flat Dog, under the auspices of its sole officer, Mr. DeMartini, oversaw all post-production transactions in the United States; it produced no other film.

### 3. Discussion

Although Respondents argue that Respondent Flat Dog and Respondent P.C. have maintained their separate corporate entities, asserting that they have separate board meetings, offices, telephone numbers, and their books and records are kept at separate locations, I cannot accept those assertions. The evidence as a whole supports a conclusion that Respondents Flat Dog and P.C. are the alter egos of each other and a single employer with regard to the business enterprise that engendered the underlying unfair labor practices, i.e., production of the Film. Respondent Flat Dog and Respondent P.C. shared office space and had the same officer and director, Mr. DeMartini. Mr. DeMartini exercised complete authority over both corporations and controlled all shares. Any corporate board meetings regarding the Film were neither formal nor documented, and there is nothing to show arms length decision-making. Indeed, it is unlikely such evidence could exist, as neither entity has a distinct or viable corporate identity separate from Respondent DeMartini.

As to Respondent DeMartini's liability for the remedial obligations of Respondents Flat Dog and P.C., the Board has found the corporate veil may be pierced when:

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<sup>21</sup> "Wrap" is the term used for post-filming work of returning equipment, breaking down sets, and finishing everything up. As explained below, I cannot accept Mr. DeMartini's testimony that all employees employed on the production in Mexico continued working until the wrap was completed, that is, until everything was done.

(1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct *and* (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. *White Oak Coal*, 318 NLRB 732, 735 (1995).<sup>22</sup>

Both factors are present here. First, neither of Respondents Flat Dog or P.C. has assets that are not easily manipulated by Respondent DeMartini. Exercising complete and sole control over all Respondents, Respondent DeMartini moved among his individual and corporate officer roles without regard to corporate distinctions or ceremony. His activities so blurred the lines separating Respondents that even he had difficulty relating within which role he handled completion of the Film in Mexico. It is clear that Mr. DeMartini finished the Film in Mexico as an amalgam of all three Respondents with Mr. DeMartini independently possessing production control over the Film in Mexico just as he had in Los Angeles.<sup>23</sup> Second, Mr. DeMartini's motive in shifting responsibility for the Film to Dragon (at least superficially) and moving its production to Mexico was to avoid the consequences of its employees' protected activities.<sup>24</sup> There is no reason to suppose the unlawful motives that resulted in employee discharges have altered. With Mr. DeMartini firmly and solely in control of all Respondents' actions, financial affairs, and business dealings, adherence to the corporate form would "sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *Id.*

Accordingly, I find it appropriate to pierce the corporate veils herein, to find Respondents Flat Dog and P.C. to be alter egos of each other, and to hold Respondent DeMartini personally liable, jointly and severally, with Respondent Flat Dog and Respondent P.C. for the backpay due in this case. See *Reliable Electric Co.*, 330 NLRB 714 (2000).

## B. Discriminatees

### 1. Alleged pool of discriminatees

The underlying decision is silent as to the names of those individuals who were employed by Respondent and terminated on August 17. The General Counsel designated 23 employees as discriminatees. Respondent does not dispute that 11 employees who engaged in the strike on August 17 had an expectation of continued employment: Andrew Bikichky, Kevin Boyle, Janos Csoma, Brian Davis, Jason Andrew, Charlie Lenz, Victor Major, Matt Smith, Ron Smith II, Anthony Tucker, and Gabrael Wilson. Respondents dispute that the remaining 12 named discriminatees engaged in the August 17 strike: Starr Barry, John Bratlien, Mae Brunken, Chris Dechert, Adam Dodds, Chad Herr, Matt Jakositz, Rick Lawrence, Alec Shepard, Alex Schmidt, David Sirianni, and Jason Young. Further, Respondents argue that the following employees were on-call employees (day players) without expectation of continued employment:

<sup>22</sup> The purpose of ignoring the corporate form is to satisfy liability by reaching the personal assets of an owner or a controlling shareholder. "...[the corporate] legal entity may not be disregarded except where equitable considerations require piercing the corporate veil." *18 Am. Jur. 2d Corporations, Sec. 44 at 843-44 (1985)*.

<sup>23</sup> Mr. DeMartini used the corporate forms of Respondent Flat Dog and Respondent P.C., in the words of *White Oak*, "as a mere shell, instrumentality or conduit of an individual or another corporation." 318 NLRB at 735.

<sup>24</sup> Mr. DeMartini testified, "[T]here was no way we could complete the picture because of union activity, so we decided to turn the picture over to Dragon." "We" can only mean Mr. DeMartini in his various roles.



Starr Barry, John Bratlien, Chad Herr, Rick Lawrence, Alex Schmidt, and Alec Shepard. Therefore, Respondents urge, no basis exists for the General Counsel's assumption that these six employees would have worked a set number of hours in the weeks following the strike.

Matthew S. Jakositz (Mr. Jakositz), who testified, worked as a set dresser in the art department for the Film production. He signed a deal memo or crew agreement (employment contract) with Respondent Flat Dog, was a fulltime employee, and expected to be employed through the entire production. His last day of work on the Film was August 16; he joined the strike on August 17.<sup>25</sup> On the night of August 18 or 19, Mr. Jakositz asked Mr. DeMartini if he could have his job back. Mr. DeMartini told him to talk to the production manager, but had "no idea" if he did so.<sup>26</sup>

Jason Young (Mr. Young), who testified, worked for Respondent Flat Dog as a set lighting technician from August 9 through 14 and August 16. He signed a deal memo with the company on August 9 and anticipated employment through the end of production. Mr. Young joined the strike on August 17.

As to the following individuals, the evidence is set forth below:

<u>Alleged Discriminatee</u>	<u>Testimony of Mr. DeMartini</u>	<u>Testimony of Jason Young</u>
Starr Barry	Employed at some point by Respondent Flat Dog. Unknown known whether he was a striker. He worked no more than three days on the production.	Starr Barry was on the [picket] line. He did not go back in.
Adam Dodds	Employed at some point by Respondent Flat Dog. <sup>27</sup>	Adam Dodds was on the line. He did not go back in.
Alex Schmidt	May have worked 1-2 days, total, as a day player. Not known whether he was a striker.	Alex Schmidt was on the line. He did not go back in.
John Bratlien	Never heard of before the compliance hearing.	John Bratlien was on the line. He did not go back in. <sup>28</sup>
Chad Herr	Never heard of before the compliance hearing.	Chad Herr is a grip. He

<sup>25</sup> In its post-hearing brief, Respondent Flat Dog inaccurately states that Matt Jakositz testified he did not engage in the strike. His testimony, while somewhat confused, is clear on that point; he refused to cross the picket line.

<sup>26</sup> Although Mr. DeMartini testified that offers to return to work were made to a number of discriminatees, he did not say who had made such offers or on behalf of what entity, and no other evidence regarding offers to return to work was adduced. Respondent Flat Dog's post-hearing brief inaccurately states that Matt Jakositz confirmed the strikers were offered reinstatement. I find no evidence that any valid offer to return to work was made to any discharged employee.

<sup>27</sup> No backpay is sought for Adam Dodds.

<sup>28</sup> The Acting Compliance Officer testified that Mr. Bratlien informed him that he had signed a deal memo with Respondent Flat Dog as a fulltime electrician. I do not base my findings as to John Bratlien on this hearsay evidence.

		was on the line; he did not go back in. <sup>29</sup>
	Rick Lawrence	Never heard of before the compliance hearing.
5	Alec Shepard	May have worked one day as a replacement during August. Not employed on August 16. Do not know whether he was a striker.
10	David Sirianni	May have worked one day as a replacement during August. Not employed on August 16. Not known whether he was a striker. It is possible he quit the production at some point.
15	Chris Dechert	May have been employed during August and on August 17, and may have been among the strikers.
	Jason Young	Do not recall his working more than seven days on the production. Do not recall ever signing off on a deal memo for him. <sup>34</sup>
20	Mae Brunken	Employed during August as set decorator and a supervisor with authority to hire and fire. Unknown whether she was a striker. <sup>35</sup>
		Did not recall Rick Lawrence. <sup>30</sup>
		Did not recall Alec Shepard. <sup>31</sup>
		Did not recall David Sirianni. <sup>32</sup>
		Thought he was on the line. <sup>33</sup>
		Set forth above.
		Did not recall Mae Brunken.

## 2. Discussion

25 Respondent Flat Dog argues the General Counsel has not met his burden of establishing the identity of the discriminatees who are the subject of the order in the underlying unfair labor practice decision. While discriminatees were not identified in the underlying unfair labor practice decision, it is clear the entire crew was fired when “Mr. DeMartini announced at the picket line, ‘The Company does not recognize that the crew is represented by the Union. 30 The crew is in violation of their written contracts and they’re all fired.’”<sup>36</sup>

35 <sup>29</sup> The parties stipulated that Chad Herr’s average weekly hours worked was 17.15.

<sup>30</sup> The Acting Compliance Officer testified that Mr. Lawrence informed him he had signed a deal memo with Respondent Flat Dog as a fulltime electrician. I do not base my findings as to Mr. Lawrence on this hearsay evidence.

40 <sup>31</sup> The parties stipulated that Alec Shepard’s average weekly hours worked was 15.25.

<sup>32</sup> The parties stipulated that David Sirianni’s average weekly hours worked was 24.43.

<sup>33</sup> The production report for August 17 shows Chris Dechert was scheduled but did not report for work.

<sup>34</sup> As indicated above, I have accepted Mr. Young’s testimony.

45 <sup>35</sup> Respondents carry the burden of proving supervisory status. *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1866-1867 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB No. 159, at slip op. 2 (2003). Any lack of evidence is construed against the party asserting supervisory authority. *Kentucky River Community Care*, supra. Mr. DeMartini’s testimony regarding Mae Brunken’s authority was conclusionary and unsupported. As I have not found him to be a credible witness, I conclude Respondents have not met their burden of proving Mae 50 Brunken’s supervisory status.

<sup>36</sup> *Flat Dog Productions, Inc.*, supra at 1574.

The Board has stated,

[R]emedial questions implicate two statutory principles that must be applied. The first principle is that the remedy should restore the status that would have obtained if Respondent had committed no unfair labor practice. The second principle is that any uncertainty and ambiguity regarding the status that would have obtained without the unlawful conduct must be resolved against the Respondent, the wrongdoer who is responsible for the existence of the uncertainty and ambiguity [citations omitted]. *Campbell Electric Co., Inc.*, 340 NLRB No 93 at slip op. 2 (2003).

Any uncertainties in the identities of the strikers are created, in large part, by Mr. DeMartini's wholesale discharge of all striking employees on August 17 and the paucity of employment records, especially the absence employment contracts, the latter of which were in Respondent Flat Dog's control. In these circumstances, it is particularly appropriate to resolve uncertainties against Respondents. With that in mind, if the evidence establishes that certain employees worked in the week prior to the strike and joined the strike, I have concluded they were encompassed by Respondent's wholesale striker discharge and are discriminatees. Further, although evidence may not directly establish an employee's presence on the picket line, if an employee worked during the days immediately prior to the strike but did not work on August 17, I have drawn the inference that such an employee was a striker and unlawfully discharged. As to alleged discriminatees, Alec Shepard and David Sirianni, no probative evidence showed them to have been employed in the days immediately preceding the strike or to have been strikers. Accordingly, I find only the following employees to be discriminatees:

Admitted by Respondents: Jason Andrew, Andrew Bikichky, Kevin Boyle, Janos Csoma, Brian Davis, Charlie Lenz, Victor Major, Matt Smith, Ron Smith II, Anthony Tucker, Gabriel Wilson.

Worked in Days Preceding Strike but not on August 17: John Bratlien (13.5 h.)<sup>37</sup>, Mae Brunken (\$166.67), Chris Dechert (1305 h.), Matt Jakositz (13.05 h.)<sup>38</sup>, Rick Lawrence (13.00 h.), Jason Young (13.50 h.)<sup>39</sup>.

Established as Strikers through Testimony of Jason Young: Starr Barry, Adam Dodds, Chad Herr, Alex Schmidt.

### C. Backpay

#### 1. The General Counsel's Calculations

For all named discriminatees, in conformity to the underlying decision, the General Counsel determined that the backpay period was fully contained within the third calendar quarter of 1999. He selected August 17 as the start date of the backpay period and suspended the backpay period between August 20, the last day of filming in Los Angeles, and September 6, when production recommenced in Mexico. For backpay termination dates, the General Counsel set September 27 for the grip, electrical, and property departments and September 28 for the art department, which took into account an additional two and three days, respectively, past the close of principal photography (September 25) to wrap the production. This resulted in

<sup>37</sup> Jason Young's credible testimony shows John Bratlien was a striker.

<sup>38</sup> Matt Jakositz's credible testimony also confirmed his employment and striker status.

<sup>39</sup> Jason Young's credible testimony also confirmed his employment and striker status

a conclusion that employees in the grip, electrical, and property departments would have worked 23 days but for their unlawful discharges, while employees in the art department would have worked 24 days, and all others would have worked 21 days. I resolve the uncertainty in when the wrap would have finished against Respondents. Mr. DeMartini testified that all work was completed the night of September 25. As noted above, I do not find Mr. DeMartini to be generally credible. Moreover, the production records of September 25 make Mr. DeMartini's testimony implausible. The production report of Saturday, September 25 shows the following: at least six sets were scheduled, six of the eight character cast worked until 7:00 p.m., as did the production director, the director of photography, the key makeup and hair person. Special effects and art department employees worked until 7:30 p.m. Evidence establishes that those individuals would not have been involved in any wrap. Accordingly, it is reasonable to infer that actual film production continued until at least 7:00 p.m. on September 25 and that the wrap was completed in the days following. Respondents having proffered no credible evidence as to when that occurred, I accept the General Counsel's estimation.

In determining the number of hours discriminatees would have worked, the General Counsel used comparable employee analyses or averaged pre-discrimination hours worked. In calculating the gross backpay, the General Counsel utilized the average earnings formula, multiplying hourly rate of pay by hours per week by weeks per calendar quarter, plus hourly rate times overtime hours per week times 1.5.<sup>40</sup> Respondent Flat Dog argues that the use of comparable hours from the Mexico part of the production is not reasonable as employees in Mexico worked longer hours and were governed by different governmental overtime regulations than employees in Los Angeles would have been. Since, as stated in *Campbell*, supra, the first principle of remedial questions is that the remedy should restore the status that would have obtained if Respondent Flat Dog had committed no unfair labor practice, what happened in Mexico is significant only as it sets a pattern, in terms of hours worked, for what would have happened had the unfair labor practices not occurred.

Respondents argue that any backpay should end as of the time Respondent Flat Dog ceased production of the Film and transferred its rights in the Film to Dragon, as both actions were lawful pursuant to *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). It is true that a total cessation of business is not an unfair labor practice even if motivated by antiunion considerations. *Id.* Even a partial closure is unlawful only if the purpose is to chill union activity in an employer's remaining operations, *Id.*

In *Plaza Properties of Michigan, Inc.*, 340 NLRB No. 115, at slip op. 7 (2003), the Board recognized a number of exceptions to the *Darlington* principles:

A closure may violate the Act if it resulted from the unlawful subcontracting of unit work [citations omitted]. The same is true if the closure is only temporary rather than permanent. See *Bruce Duncan Co., Inc. v. NLRB*, 590 F.2d 1304, 1307 (4th Cir. 1979) (Court's reasoning in *Darlington* is only applicable when the closing of the plant is an actual closing and not a temporary suspension of operations); *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1292 (5th Cir. 1980) (*Darlington* does not permit an employer to close his business temporarily and then reopen it in order to oust the union); see also *Gallup, Inc.*, 334 NLRB 366 (2001), aff'd. \_\_\_ F.3d \_\_\_ (5th Cir. 2003) (Table).

<sup>40</sup> As to discriminatee Mae Brunken, the General Counsel used her daily rate in calculating backpay.

Here, Respondent Flat Dog did not actually close its production of the Film, it moved its production to Mexico. While Respondent Flat Dog purportedly transferred rights to the Film, Respondents continued to exercise complete control over the production upon its relocation to Mexico. In those circumstances, the backpay obligation accruing from Respondent Flat Dog's unfair labor practices continued unabated.

## 2. Discussion

The general principles in determining backpay, as summarized in many Board decisions including *Performance Friction Corporation*, 335 NLRB 1117 (2001), are well-established: The General Counsel's must show the gross backpay due each claimant, i. e., the amount the employees would have received but for the employer's illegal conduct. Any backpay computation formula that closely approximates the amount due, if it is not unreasonable or arbitrary in the circumstances, is acceptable. *Id*; *Reliable Electric Company*, 330 NLRB 714, 723 (citations omitted.) The comparable or representative approach to determining backpay is an accepted methodology. *Performance Friction Corporation*, supra at 1117. The differences between Mexico and California employment conditions do not alter the reasonableness of the comparability method, particularly as uncertainties or ambiguities are to be resolved in favor of the discriminatee. The burden is on a respondent to establish any affirmative defenses that would mitigate its liability, including the amount of interim earnings to be deducted from the backpay amount due, and any claim of willful loss of earnings. Here, General Counsel has met his burden of proving gross backpay, and Respondent has not met its burden of proving any affirmative defenses.

I find the General Counsel's calculations to be fair, reasonable, and accurate approximations of the earnings the discriminatees would have enjoyed had they not been unlawfully terminated. See *weldun International, Inc.*, 340 NLRB No. 79 (2003).

I recommend that Respondents Flat Dog, P.C., and DeMartini be ordered to pay the following amounts to the employees listed below plus interest accrued to the date of payment.

## SUPPLEMENTAL ORDER

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following Supplemental Order: <sup>41</sup>

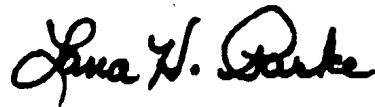
**IT IS HEREBY ORDERED** that Respondent Flat Dog Productions, Inc. (Flat Dog Corporation), its alter ego, Respondent Frank T. DeMartini, P.C., and Respondent Frank T. DeMartini, individually, their officers, agents, successors and assigns, shall forthwith make whole the following individuals by paying each of them, respectively, the sum set forth, plus interest and minus tax withholdings, if any, required by Federal and state laws:

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<sup>41</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Supplemental Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

	Jason Andrew	\$3,508.36	Matthew Jakositz	\$2,098.02
	Starr Barry	\$ 521.24	Rick Lawrence	\$2,992.32
5	Andrew Bikichky	\$3,381.69	Charlie Lenz	\$2,933.51
	Kevin Boyle	\$3,504.95	Victor Major	\$3,377.67
10	John Bratlien	\$2,220.29	Alex Schmidt	\$ 202.55
	Mae Brunken	\$4,000.08	Matt Smith	\$2,821.97
	Janos Csomo	\$1,654.82	Ron Smith II	\$2,368.13
15	Brian Davis	\$2,843.43	Anthony Tucker	\$3,768.06
	Chris Dechert	\$ 990.80	Gabrael Wilson	\$2,098.02
20	Adam Dodds	\$ 0.00	Jason Young	\$1,555.00
	Chad Herr	\$ 578.97		

Dated, at San Francisco, CA: November 24, 2003



Lana H. Parke  
Administrative Law Judge